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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

WILLIAM W. MARTIN, ROBERT E. MOSHER, and the Legal Action Committee for Marlin Investments,
Petitioners,

v.

GILBERT ROBINSON, Trustee in Bankruptcy,
Respondent.

WILLIAM EVERETT KANE AND BARBARA KELLY,
Interested Parties and Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 12, 1986

QUESTION PRESENTED

Whether the Court of Appeals and the District Court correctly determined that the Bankruptcy Court made an informed and independent judgment that the compromise was fair and equitable and that the Bankruptcy Court did not abuse its discretion in approving the compromise.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were:

Gilbert Robinson, Trustee in Bankruptcy, Appellee
William Everett Kane, Interested Party
Barbara Kelly, Interested Party
K & K Properties, Inc., Interested Party
William W. Martin, Objector, Plaintiff, Appellant
Robert E. Mosher, Objector, Appellant

William Everett Kane and Barbara Kelly file and serve this Opposition to Petition for Writ of Certiorari as Respondents pursuant to Supreme Court Rule 19.6.

Petitioners' opening brief contains a list of numerous individuals who are described as constituting the members of the "so-called" Legal Action Committee for Marlin Investments and Petitioners allege that it is on behalf of those parties, in addition to certain others set forth above, that objections have been made and the instant Petition for Writ of Certiorari is being pursued. However, there has never been a judicial finding (i) that the alleged Legal Action Committee for Marlin Investments actually exists, (ii) that the numerous individuals listed are actually members of said committee, or (iii) that any of the numerous individuals listed even concur in the position taken by Petitioners. Respondents further believe that the Legal Action Committee has no standing in this liquidation bankruptcy case.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

Petitioners' statement of the case in their opening brief sets forth many factual allegations unsupported by the record, and outright distortions and misstatements of alleged facts. These not only distract from but are irrelevant to the question properly before this Court, which is to determine whether a writ of certiorari should be granted. Respondents merely wish to state, for the record, that they do not concur with Petitioners' version of the facts.

SUMMARY OF ARGUMENT

The Bankruptcy Court made an informed and independent judgment, after several hearings, that the compromise at issue was fair and equitable. Both the District Court and the Court of Appeals found that this was the case, based upon the Bankruptcy Court's Findings of Fact and Conclusions of Law and upon the extensive record, consisting of well over four thousand pages, compiled in this action. Thus, there is no important question of federal law or deviance from established authority for which to grant this Petition for Writ of Certiorari.

There is also no "most important factor" test in any circuit for determining whether a bankruptcy compromise should be approved. Petitioners' attempt to create the appearance of a division among the circuits on this ground is a mere subterfuge at getting a second crack, after losing the first time, at a hearing on the merits of the compromise.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY DETERMINED THAT THE BANKRUPTCY COURT MADE AN INFORMED AND INDEPENDENT JUDGMENT THAT THE COMPROMISE WAS FAIR AND EQUITABLE AND THAT THE BANKRUPTCY COURT DID NOT ABUSE ITS DISCRETION IN APPROVING THE COMPROMISE

A. The Court Of Appeals And The District Court Correctly Determined That The Bankruptcy Court Made An Informed And Independent Judgment That The Compromise Was Fair And Equitable Under All Relevant Circumstances

Petitioners seek from this Court a Writ of Certiorari in the hopes of reversing the decision of the Ninth Circuit Court of Appeals which affirmed the United States District

Court's affirmance of the bankruptcy judge's decision to approve the 1982 Settlement Agreement. The Bankruptcy Act, Section 27, 11 U.S.C. § 50, however, grants broad authority to the trustee to compromise any claims arising in the administration of the bankruptcy estate under such terms as he deems reasonable. *In Re California Associated Products Co.,* 183 F.2d 946 (9th Cir. 1950). The only requirements for approval of the compromise are that the trustee demonstrate that the controversy is of the type that should be resolved by compromise, and that the proposed compromise is reasonable under the circumstances. *In Re Equity Funding Corp. of America,* 519 F.2d 1274 (9th Cir. 1975). There has been no suggestion that the disputes covered by the 1982 Settlement Agreement ought not to be settled. Petitioners merely attack the District Court's and the Court of Appeals' affirmance of the Bankruptcy Court's decision that this particular settlement was a reasonable one.

The bankruptcy judge, in approving a compromise, need not determine that all claims compromised were necessarily valid or that the litigation could not have been resolved to the benefit of the estate. As the Court in *In Re California Associated Products Co., supra,* at 949-950 stated:

> "As to what the ultimate outcome of the litigation would have been, we are not now [on appeal] directly concerned. The primary purpose of a compromise settlement is to avoid the necessity of determining sharply contested and dubious issues. It is sufficient if we can say that the outcome would have been doubtful. If the claim of the appellant had substantial foundation and was not clearly invalid as a matter of law then there was no abuse of discretion on the part of the referee in approving the compromise."

The bankruptcy judge is merely required to determine that the compromise is reasonable:

> "In undertaking an examination of the settlement, we emphasize that this responsibility of the bankruptcy judge, and ours upon review, is not to decide the numerous questions of law and fact raised by appellants but rather to canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness', *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir.), *cert. denied sub nom. Benson v. Newman,* 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972)."

In Re W. T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983).

The factors to be considered in deciding whether to approve a compromise in bankruptcy proceedings have been summarized as follows:

> "(1) The probability of success in the litigation with due consideration for the uncertainty in fact and law,
>
> (2) The complexity and likely duration of the litigation and any attendant expense, inconvenience, and delay, and
>
> (3) All other factors bearing on the wisdom of the compromise."

Matter of Jackson Brewing Co., 624 F.2d 605, 607 (5th Cir. 1980) ("*Jackson II*") (Citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414 (1968) ("*TMT Trailer*").)

Petitioners' principal assertion is that certain stringent standards must be met by trial and appellant courts, both in the approval and in the review of bankruptcy settlements, to verify that an informed and independent judgment is made by the court in approving bankruptcy settlements. These standards would include a more elaborate hearing on the approval of a settlement agreement, constituting a mini-trial, thereby enabling petitioners to inquire

into various matters which the Bankruptcy Court found to be inappropriate for the hearing which it held. Petitioners primarily base their assertion upon *TMT Trailer* and *Jackson II*. However, both of these cases involve a Chapter X reorganization of a public corporation, and do not require a mini-trial as petitioners would impose on the courts. Furthermore, the opinion below by the Ninth Circuit recognized, to the extent they are applicable, the import of these decisions to a Chapter VII liquidation.

This Court's decision in *TMT Trailer* involved a corporate reorganization under Chapter X of the Bankruptcy Act of 1898, in which the District Court approved an amended plan of reorganization which compromised certain claims and excluded the original shareholders from participating in the reorganized company. The Supreme Court held that it was error to affirm the District Court's approval of compromises of claims against the debtor, and that it was error to affirm the District Court's judgment that the debtor was insolvent, when that judgment was rendered without considering the future estimated earnings of the reorganized company. In its ruling that it was error to affirm the District Court's approval of compromises against the debtor, this Court noted that the record did not support the approval:

> "If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based. The deficiency in this case, however, is not merely a formal one. The evidence referred to by respondent is analyzed at greater length in the margin[19]. Here it is enough to say that to the extent that the record contained solid facts of the sort necessary for appraising the merits of the claims against M-S, virtually all of them point to the probable existence of

valid and valuable causes of action. Balancing these facts are nothing but bold assertions to the contrary and general conclusions for which foundations no where appear." 390 U.S. at 437-439 (footnote omitted).

Thus, in *TMT Trailer,* the trial judge used only conclusory language in determining that the settlement in the Chapter X proceeding was fair and equitable, and, additionally, the record was devoid of facts to support the trial judge's conclusions. The degree of scrutiny and the trial court's documentation of it, however, will and should vary according to the nature of the proceedings. In a reorganization proceeding, the settlement agreement must be carefully scrutinized to ensure that the reorganized corporation has sufficient assets to become viable once it comes out of bankruptcy. In contrast, less scrutiny is needed when a corporation is being terminated in a liquidation proceeding, since all of its assets are being distributed to the various creditors.

This distinction was recognized by the Ninth Circuit in *In Re Blair,* 538 F.2d 849 (9th Cir. 1976). In deciding *In Re Blair,* the Ninth Circuit expressly considered the question of whether the dictates of *TMT Trailer,* a Chapter X reorganization proceeding, applied to a compromise approved in a liquidation proceeding pursuant to Section 27 of the Bankruptcy Act (11 U.S.C. § 50). The Court stressed:

"Appellant asserts that even in a liquidation bankruptcy compromise proceeding, there must be a mini-trial on the merits of claims sought to be compromised. We reject the notion. The decision as to whether there should be a mini-trial in a liquidation bankruptcy as to the merits of the compromised claims and defenses is best left to the sound discretion of the bankruptcy judge upon an application and showing of necessity by the interested parties or by creditors of the bankrupt.

> This is not the same as a Chapter X proceeding and there are sound reasons for drawing the distinction. A corporate reorganization is a continuing business affair requiring close supervision and affecting many interested parties. The success or failure of a reorganization may hinge upon the very compromise at issue.[2] A liquidation bankruptcy is a terminal affair. The bankrupt's financial affairs are beyond repair. Liquidation is to be accomplished as rapidly as possible consistent with obtaining the best possible realization upon the available assets and without undue waste by needless or fruitless litigation."
>
> * * *
>
> "[2] In *Protective Committee For Independent Stockholders, etc. v. Anderson, supra,* 390 at 423, 88 S.Ct. at 1163, the lower court judgment 'was rendered without considering the future estimated earnings of the reorganized company.' Such a vital issue is not involved in a liquidation bankruptcy compromise".

538 F.2d at 851-852. *See also In Re Flight Trans. Corp. Securities Litigation,* 730 F.2d 1128, 1135 (8th Cir. 1984) (citing *In Re Blair); In the Matter of Orrin A. Ericson,* 6 BRW 1002, 1010 (D. Minn. 1980)(citing *In Re Blair).*

The case of *Jackson II, supra,* which is cited by Petitioners, is also a Chapter X corporate reorganization compromise proceeding, and consequently, is also inapposite to the instant appeal in connection with the scope of the hearing that is required.

However, even if the standards imposed by *TMT Trailer* and *Jackson II* are applicable to the present case, the Bankruptcy Court met these standards by analyzing the potential for prosecution of the claims released by the settlement agreement and found this course of action to be:

> "complex, uncertain of result and potentially expensive ... in terms of attorneys fees, court costs and delay required, which delay could reasonably be expected to result in damage to the estate or detriment to creditors." (Petitioners' Appendix G, p. 69.)

Further, the record compiled after five days of extensive hearings held in connection with approval of the settlement agreement is more than sufficient to establish both the complexity and doubtful outcome of litigating the disputes which were compromised through the settlement agreement, and that the settlement agreement was reasonable given the particular circumstances of the case and other required factors. As the opinion below of the Ninth Circuit noted:

> "It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable. The litigation was filed in the bankruptcy court in 1976, and the judge who approved the compromise had handled the matter since 1980. Thus, in addition to the settlement agreement, the bankruptcy judge had heard testimony on the value of the corporation's assets, the terms of the ESOT (which appellants challenge), and was well aware of the claims being asserted by appellants in their Adversary Proceeding D, which was before the court. There is clear support in the record for our affirming the findings of fact with respect to the approval of the compromise." *In Re A & C Properties,* 784 F.2d 1377, 1383 (9th Cir. 1986).

B. There Is No "Most Important Factor" Test For Determining Whether A Bankruptcy Compromise Should Be Approved

Petitioners erroneously assert that the second, fourth, fifth, seventh and eighth circuits have adopted a "most important factor" test for determining whether a bankruptcy compromise should be approved. This "most important factor" is asserted to be the probability of success on the merits. (Opening Brief, p. 24.)

However, neither the various circuit decisions cited by Petitioners nor this Court's decision in *TMT Trailer* supports this rather bizarre "most important factor" test for bankruptcy proceedings. Specifically, Petitioners cite *In Re General Tire & Rubber Securities Litigation,* 726 F.2d 1075 (6th Cir. 1984). However, the *General Tire* case involved court approval of a settlement of several derivative action suits, in which the trial court exercised its own business judgment in approving the settlements. Similarly, the second case cited by Petitioners, *Parker v. Anderson,* 667 F.2d 1204 (5th Cir. 1982), involves approval of a settlement of a class action employment discrimination suit. Further, all of the cases of the various circuits referred to in *Parker,* which Petitioners conveniently leave out of their quote (Opening Brief, p. 24), are class action cases involving employment discrimination and anti-trust claims. None of the cases Petitioners cite in support of their "most important factor" test involve bankruptcy proceedings, and those bankruptcy decisions which are otherwise cited by Petitioners do not even mention such a test.

While it may be true that in derivative and class actions the most important factor in determining whether or not to approve a settlement is the likelihood of success on the merits, these actions differ significantly in character from bankruptcy settlements. In a class action suit, the only concern is with the well being of the class members. However, in a bankruptcy proceeding, the trial court or bankruptcy court is primarily concerned with the health and welfare of the estate. 11 U.S.C. § 50 (1976); *see, In the Matter of Walsh Const., Inc.,* 669 F.2d 1325, 1328 (9th Cir. 1982).

Furthermore, the position advocated by Petitioners, that one factor be considered paramount over all others, runs contrary to this Court's decision in *TMT Trailer.* This Court in *TMT Trailer* stressed:

> "Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." 390 U.S. at 424.

The *TMT Trailer* test, therefore, is essentially a balancing test in which "the district court must consider all factors bearing on the fairness of the settlement . . ." *In Re Flight Transp. Corp. Securities Litigation, supra,* at 1135. To impose a "most important factor" test would unduly burden and complicate the court's determination of whether to approve a bankruptcy settlement. In fact, none of the bankruptcy cases cited by Petitioners require such an analysis.

C. The Court Of Appeals And The District Court Correctly Determined That The Bankruptcy Court Did Not Abuse Its Discretion In Approving The Compromise

The bankruptcy courts enjoy wide latitude to approve those settlement agreements they deem to be proper, and their decision will not be overturned unless there is an abuse of discretion. The closeness of the trial court judge to the proceedings at hand provides one of the major foundations for this rule. As the court in *In The Matter of Walsh Const., Inc.*, 669 F.2d 1325, 1328 (9th Cir. 1982) noted:

> "The reasonableness of a compromise is determined by the particular circumstances of each case. [Citation omitted]. Because the bankruptcy judge is uniquely situated to consider the equities and reasonableness of a particular compromise, approval or denial of a compromise will not be disturbed on appeal absent a clear abuse of discretion. [Citations omitted.]"

Accord, In the Matter of Aweco, Inc., 725 F.2d 293, 297 (5th Cir. 1984); *Matter of Ocobock*, 608 F.2d 1358, 1360

(10th Cir. 1979); *In Re Albert-Harris, Inc.*, 313 F.2d 447, 449 (6th Cir. 1963).

Petitioners contend that because each and every one of their multitudinous, redundant or irrelevant objections did not merit specific attention in the Court's written findings, some wrong was done to them. As previously discussed, the Bankruptcy Court was not required to expand the hearing on the settlement agreement to that of a mini-trial.

Petitioners, in their opening brief, rely heavily upon the case of *Mandujano v. Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976) to support their assertion that the Bankruptcy Court failed to properly dispose of Petitioners' objections. That case, however, involves a settlement of a class action suit filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000(e) *et seq.*, and 42 U.S.C. 1981, in which the Court indicates that the more stringent requirements of that case are not applicable in the instant case:

> "Observance of these procedures will impose a burden on trial courts required by Rule 23(e) to approve dismissals or compromises of class actions intended to vindicate Title VII rights. This added burden, however, is necessary to assure that valid objections are voiced, to inform the trial court, and to create a reviewable record. [citation omitted]. The interests Title VII is designed to secure are sufficiently important to warrant procedures which minimize the risk of those interests being prejudice by the normal pressures to settle complex litigation affecting a substantial part of the work force of an employer." 541 F.2d at 836.

Petitioners would therefore have Rule 23 of the Federal Rules of Civil Procedure and the heightened burden required in a Title VII action apply to the instant case, even though this is not a class action. However, Rule 52(a) of the Federal Rules of Civil Procedure governs here, and

"does not require the court to make elaborate findings . . . upon all such facts as will present every possible view of the case." *In Re Imperial Irrigation Dist.*, 38 F.Supp. 770, 772 (S.D. Cal. 1941), *aff'd*, 136 F.2d 539 (9th Cir. 1943), *cert. denied*, 321 U.S. 787 (1944). A finding of such essential facts as lay a basis for the decision is sufficient. *Id.* Furthermore, findings need not assert the negative of rejected propositions. *Schilling v. Schwitzer-Cummins Co.*, 142 F.2d 82 (D.C. Cir. 1944); 5 A *Moore's Federal Practice* (2d ed.) 52.06[1].

Moreover, "findings [of the trial court] are to be construed liberally in support of a judgment or order . . . Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn . . ." *Id.*, citing *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175, 179 (7th Cir. 1948), *aff'd* 336 U.S. 956 (1949). See *Transport Equipment Co. v. Guaranty State Bank*, 518 F.2d 377 (10th Cir. 1975) (where different inferences may be drawn, the Court of Appeals will not substitute its judgment for that of the trial court); *Uniroyal, et al. v. Mumford*, 454 F.2d 1233, 1234 (7th Cir. 1972) (Court of Appeals must look to evidence most favorable to trial court's findings and to such reasonable inferences as may be drawn therefrom). In the case of *Manning v. Jones*, 349 F.2d 992, 996 (8th Cir. 1965), the Court stated the rule as follows:

> "[A] district court's findings of fact must be liberally construed and found to be in consonance with the judgment if the judgment has support in the record evidence . . . This is so even if the findings are not as specific or detailed as might be desired".

Even the failure of a trial court to comply with the requirements of FRCP 52(a) does not require reversal "if a full understanding of the questions presented may be had without the aid of separate findings." See *Magna Weld*

Sales Co. v. Magna Alloys & Research Pty., Ltd., 545 F.2d 668 (9th Cir. 1976). Findings are not a jurisdictional requirement of appeal but only aid appellate courts in reviewing the decision below and defects therein may be waived where the error is not substantial in the particular case. *Rossiter v. Vogel*, 148 F.2d 291, 293 (2d Cir. 1945).

Thus, the Bankruptcy Court was not obligated to make elaborate responses to each and every one of Petitioner's objections. In *Jackson II, supra*, the Court noted that specific and detailed responses did not need to be made directly or expressly on every point of contention:

> "The evidence on this issue and others before the District Court was thorough and comprehensive. Clearly the Court was familiar with the entire record, touched all material basis of the objections of the creditors, and held directly, expressly or by necessary implication on every substantial point of contention. The District Court properly satisfied the requirements of *TMT Trailers* . . . The Court's approval of the arrangement constitutes not an abusive discretion, but an uncompromising examination and approval of this carefully constructed compromise.
>
> As did the district judge, we hope this brings an end to this never ending controversy." *Id.* at 612.

It is difficult to imagine a more appropriate summation of the instant case.

The Bankruptcy Court's disposition of Petitioners' objections was not carried out in a fashion that was clearly erroneous or which constituted an abuse of discretion. The Findings of Fact and Conclusions of Law adopted by the Bankruptcy Court specifically held that all the elements necessary for approval of a compromise existed. As previously stated, these elements include existence of substantial disputes of the type amenable to compromise and the

reasonableness of a proposed compromise given the particular circumstances of the case. *In Re Equity Funding Corp. of America, supra,* at 1227.

The record supports the Bankruptcy Court's Findings of Fact and Conclusions of Law, which are sufficiently comprehensive. Whether or not more elaborate Findings of Fact and Conclusions of Law are required in Chapter X cases pursuant to the cases of *TMT Trailer* and *Jackson II,* as has previously been discussed, the law does not require that a mini-trial be held in connection with the compromise in a bankruptcy liquidation case. It is only necessary that the Findings of Fact and Conclusions of Law reflect the matters actually addressed by the bankruptcy court at the hearing, and are based on substantial evidence. Where, as here, the Findings of Fact and Conclusions of Law are based upon substantial evidence, there is no abuse of discretion and the Findings of Fact and Conclusions of Law are not clearly erroneous.

CONCLUSION

The Bankruptcy Court entered its order approving the compromise after a full evidentiary hearing, properly noticed to all parties. Indeed, the Bankruptcy Court rendered its decision in a thorough and detailed manner, after an additional hearing on challenges to the proposed findings and conclusions. The Bankruptcy Court thus evidenced a clear understanding of the standards governing approval of bankruptcy compromises as well as a full cognizance of the facts of the case. The compromise and dismissal orders were drawn in such a way as to meticulously safeguard the rights of all parties, including Petitioners. Not only has no error of law been demonstrated but there is no important question of federal law or deviance from established authority for which to grant this Petition.

Furthermore, there is no difference among the circuits as to the need for a bankruptcy court to make an informed

and independent judgment that a compromise is fair and equitable and to issue appropriate findings thereon. There is therefore no need or reason for this Court to grant the instant Petition for a Writ of Certiorari.

Dated: September 12, 1986.

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